FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 29 1940
CHARLES ELMORE CROPLEY
Clerk

# Supreme Court of the United States

**October Term, 1939.**

**No. 342.**

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATION,

*Petitioner,*

*against*

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.,

*Respondents.*

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

## REPLY BRIEF FOR THE PETITIONER.

BOUDIN, COHN & GLICKSTEIN,
*Attorneys for Petitioner,*
20 West 43rd Street,
New York City.

LOUIS B. BOUDIN,
*of Counsel.*

The Hecla Press : New York City 39

# INDEX.


| | PAGE |
|---|---|
| STATEMENT | 1 |
| POINT I—The "standing" of Petitioner in the main case. | 3 |
| POINT II—Time to lay a ghost—and to settle an important question of procedure under the National Labor Relations Act | 4 |
| (a) As to the present membership status of the rival unions | 5 |
| (b) The I.B.E.W. never was a majority union | 5 |
| (c) Must counsel object to the admission of documents which have no probative value on pain of being held to have admitted the correctness of their contents? | 10 |
| POINT III—The questions what Consolidated Edison did and whether it had a right to do it relate to the merits of the application, with which this Court has no concern on this review | 12 |
| POINT IV—The question as to what relief, if any, petitioner was entitled to is likewise not before this Court. | 13 |
| POINT V—No new findings by the Board were necessary as a preliminary to the application to punish for contempt. Nor was the Board authorized to make any new findings without direction from the Court | 14 |
| A. The Board has made all the findings which it is authorized to make under the Act and which are necessary for the determination of the main question of merits presented to the Court below. | 16 |
| B. The principal question presented to the Court below was one on which the Board could not, with propriety, make any findings | 18 |

PAGE

POINT VI—That the Board could move to punish for a civil contempt, if it can do so under the act, is no argument against petitioner having that right..... 25

POINT VII—The application to the court below which resulted in the order under review was made in the enforcement proceeding to which petitioner actually was a party..... 26

POINT VIII—Certain Cases Distinguished..... 28

A. The Doctrine of the *Sprunt* Case..... 29
B. The Doctrine of the *Blankenship* Case..... 30
C. The cases decided under the National Labor Relations Act which, it is claimed, support the contention of the other side..... 32

POINT IX—The Securities and Exchange Act Distinguished..... 36

POINT X—Earlier Statutes as Models, and the Problem of "Assimilation"..... 38

CONCLUSION..... 40

APPENDIX A—The Formal Standing and Extent of Actual Participation of Petitioner and Its Counsel in the Litigation Which Resulted in the Decree Claimed to Have Been Violated by the Respondent Companies... 41

APPENDIX B—The Extent of Petitioner's Participation in the Litigation Which Terminated in the Decree Herein..... 46

APPENDIX C—Cover of Brief for the Petitioners, Consolidated Edison Company of New York, Inc., et al., in No. 19, October Term, 1938..... 49

APPENDIX D—Cover of Reply Brief for Petitioners, The International Brotherhood of Electrical Workers and Its Above-named Local Unions, to Brief of Respondent, The National Labor Relations Board, in No. 25, October Term, 1938..... 50

## TABLE OF CASES.


PAGE

Agwilines, Inc. v. National Labor Relations Board, 87 F. (2d) 146 ..... 32, 33

Blankenship v. Kurfman, 96 F. (2d) 450 ..... 30, 31, 32

Consolidated Edison v. N.L.R.B., 4 N.L.R.B. 71, 73, 94 .. 4, 20
Consolidated Edison v. N.L.R.B., 305 U. S. 197, 232. 6, 9, 21, 28

Federal Trade Commission v. McLean, 94 F. (2d) 802 .. 25
Ford Motor Co. v. N.L.R.B., 305 U. S. 364 ..... 18
Fur Workers Union v. International Fur Workers Union, 105 F. (2d) 1, aff'd Dec. 11, 1939 by this Court ..... 23, 32

Gompers v. Bucks Stove and Range Co., 221 U. S. 418 .. 26

McCrone v. U. S., 307 U. S. 61 ..... 25

N.L.R.B. v. Carlisle Lumber Co., 99 F. (2d) 533 ..... 32, 33
N.L.R.B. v. Colten et al., 105 F. (2d) 179 ..... 32, 35
N.L.R.B. v. Hearst, 102 F. (2d) 658 ..... 32, 34
N.L.R.B. v. Hopwood Retinning Co., 104 F. (2d) 302 .. 26, 27

Sprunt & Son v. U. S. 281 U. S. 249 ..... 29, 30
Squiers v. Thompson, 172 N. Y. 652 ..... 14

Texas & N. O. R. Co. v. Brotherhood, 281 U. S. 548 .. 40

Virginian Railway Co. v. System Federation, 300 U. S. 515 ..... 40


## STATUTES AND DOCUMENTS.


Interstate Commerce Act, Sec. 16(12) ..... 36
National Labor Relations Act, Sec. 9(a) ..... 22, 23
New York Civil Practice Act, Sec. 243 ..... 5
Railway Labor Act, Sec. 7 and Sec. 8(a) ..... 39
Securities and Exchange Act, Sec. 77-1 and 77-t(b), 44 Stat. 77; 49 Stat. 129 [U. S. Code, Title 15, Sec. 77-1(2)] ..... 36
Senate Committee's Report No. 573, 74 Congress, 1st Session, page 14 ..... 39

# Supreme Court of the United States

OCTOBER TERM, 1939.

**No. 342.**

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioner,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## REPLY BRIEF FOR THE PETITIONER.

### Statement.

There are certain things about the briefs submitted on behalf of the respondents which require a preliminary statement before answering some of the arguments presented therein.

The brief submitted on behalf of Consolidated Edison contains so many inaccuracies and misleading statements that it would require entirely too much space to correct them. Most of them relate to the question of the "participation" or "standing" of Petitioner in the main case, and are more

annoying than important. We shall therefore not discuss them in the body of this brief. But for the information of the Court, in the event that the Court should consider any of these matters important, we print in a series of appendices at the end of this brief, containing—(a) a complete abstract of the proceedings in the main case, showing the *titles* of the case at its different stages and nature and extent of the participation of Petitioner and its counsel therein; (b) a quotation in full of a colloquy between the trial examiner and counsel which furnished the peg upon which counsel have hung their preposterous claim that Petitioner was excluded by the Board from participation in the proceedings before the Board; and (c) facsimile reproductions of the covers of the briefs submitted by both sets of counsel when this case was last before this Court, showing what they thought of Petitioner's standing in the case.

More important is the fact that both sets of counsel, in their respective briefs, while starting out with a recital of the fact that the Petitioner has stipulated not to bring up any matter other than its standing in court to move for the punishment of Consolidated Edison for a violation of the decree entered in the main case, proceed to devote a considerable portion of their space, if not actually most of it, to a discussion of the alleged merits of the controversy which Petitioner sought to bring before the court. Both sets of counsel devote a considerable portion of the introductory matter of their brief to statements which can only bear on the question of merits, which *were not considered below*, rather than the question of the right of Petitioner to move the case for trial, *which is the only question now before this Court.*

We must commend the straightforwardness of counsel for I.B.E.W. who, in the argument itself, segregate the argument on the merits into a separate section (pp. 22-29), which permits us to give notice that we disregard it,—which we accordingly do. Counsel for Consolidated Edison, however, insinuated the argument on the merits into the argument about Petitioner's standing and the two arguments are so

intermingled that it is utterly impossible to segregate them, which puts us at the disadvantage of seemingly admitting facts which are really denied, while all that we intend to do is to ignore an argument which we believe does not properly belong to the present stage of the case, but should be reserved for the time when, as we hope, the merits of this case will be discussed before the Circuit Court of Appeals, or before this Court on appeal from the decision of that court by either side after the merits shall have been inquired into by the court below and decision rendered thereon. We have therefore found it necessary, while never *arguing* the merits, to point out that certain matters argued or asserted in the briefs of counsel on the other side appertain to the question of merits and not to the question of standing.

## POINT I.

### The "standing" of Petitioner in the main case.

In our main brief we stated that Petitioner was a party to the main suit which resulted in the decree alleged to have been violated by Consolidated Edison. In answer to this, counsel for Consolidated Edison in their brief make repeatedly the assertion that Petitioner was not permitted to participate in the original hearing before the National Labor Relations Board, and that its participation after the entry of the formal order permitting it to intervene was "limited" either by that order or by the nature of the application of its counsel which resulted in the entry of that order. The first is contrary to the fact; and the second utterly unwarranted.

As already stated, both of these matters are dealt with in detail in the appendices annexed to this brief. But we deem it important to quote right here the official statement of the National Labor Relations Board as to the extent of the participation of Petitioner and its counsel in the proceedings before that Board. Aside from the listing of Messrs. Louis B. Boudin and Sidney Elliott Cohn as counsel for the

United (the designation under which Petitioner was then known) in the list of counsel, following the title of the proceeding and preceding the text of its decision, the Board says in the body of the decision itself, in the preliminary statement of the formal proceedings—

> "Pursuant to the amended notice, a hearing was held at New York City on June 3, 10, 11, 14, 15, 16, 17, 23, 24 and July 6, 1937, before Robert M. Gates, duly designated as Trial Examiner by the Board. *The Board, the respondents, and the United were represented by counsel and participated in the hearing.*"
>
> 4 N. L. R. B., 73.

## POINT II.

**Time to lay a ghost—and to settle an important question of procedure under the National Labor Relations Act.**

Throughout their briefs, both sets of counsel refer to the I.B.E.W. as the "majority union"; and counsel for Consolidated Edison repeatedly state that the I.B.E.W. locals "indisputably" represented the vast majority of its employees both at the time of the original hearings before the Board as well as at the time of the application to the Circuit Court of Appeals to punish for contempt. It is our contention that this matter is utterly irrelevant to the question now before this Court. We believe it is irrelevant even to the merits of the application below as we view the law, but if relevant at all it goes to the merits of the application and not to the standing of Petitioner in making it. We should therefore consider it proper to ignore this statement. Unfortunately, we have done so on a former occasion,—with rather disastrous results, and are therefore fearful of doing so again. Particularly, since we are forcibly reminded of our mistake on the former occasion by the fact that counsel on the other side actually quote the decision of this Court in the main

case as authority for the assertion of fact just referred to in so far as it relates to the situation as it existed at the time when this matter was before the Board for adjudication on the charge of unfair labor practice filed by Petitioner. We feel, therefore, compelled,—much to our regret,—to make a brief statement with respect thereto.

(a) *As to the present membership status of the rival unions.*

It is our position that as a matter of law the present relative strength of the two unions is of no relevancy to the *merits* of the application in the court below. If it is, the place to *litigate* the question is in the court below. Clearly, this matter cannot be considered by this Court, after the court below has sustained the contention of the respondents *that the merits ought not to be gone into* because the Petitioner has no standing to bring the question to the attention of the court. That this was a matter for *litigation* in the court below is self-evident. At the points we are now considering counsel for Consolidated Edison do not say that the matter is *undisputed.* Instead they say it is not "disputable". What is "disputable" is a matter of opinion. On the other hand, what is or is not *disputed* is a question of fact: *And counsel for Consolidated Edison know that the matter is very hotly disputed as a matter of fact.*

It is also denied in this proceeding as a matter of law (Civil Practice Act [N. Y.], Sec. 243).

(b) *The I.B.E.W. never was a majority union.*

We now come to the ghost that must be laid,—the alleged lost of 30,000 members which the I.B.E.W. is supposed to have had at the time of the Board's decision. Again we say, that it is our position that this matter is utterly irrelevant to the merits of the application in the court below; and if it were relevant, that was the court in which the question should have been litigated. But at this point we are met

with the assertion that this Court has already passed on that question. If that were so, the matter could not, we take it, be litigated in the court below. This makes it important that we discuss the matter here, since otherwise we would be precluded by that contention if we do get the chance to try this case on the merits in the court below.

In support of the amazing contention that this Court had *decided* that the I.B.E.W. had 30,000 members,—when the question had never been litigated and as a matter of fact it never had even half that many,—we are cited to a passage of the opinion of this Court in the main case. The exact language of counsel for Consolidated Edison is as follows:

> "* * * the I.B.E.W. is the labor organization of which a large majority of the respondents' employees were *undisputedly* members at the time of the prior proceedings (305 U. S. 197, 232)" (Brief for Consolidated Edison, p. 7).

As the Petitioner had at no time admitted that a majority of Consolidated Edison's employees were members of the I.B.E.W., and the matter had been continuously and vociferously disputed all along, counsel could not have possibly used the word "undisputedly" unless they meant to assert that that *dispute* was settled by the decision of this Court, and that such decision is contained on the page of the opinion of the court indicated. This brings us to a consideration of the passage of the opinion of this Court indicated by counsel for the Respondents, and how it came to be there.

As appears from the record in the main case, the taking of testimony was closed on June 24, 1937, except for the testimony of Consolidated Edison's witnesses Carlisle and Dean, whose testimony was agreed to be taken, and was taken, on July 6, 1937. Up to that time no one had taken the stand, either on behalf of the Respondent companies or on behalf of I.B.E.W., to give any account or offer any estimate of the latter's membership among Consolidated Edison employees. When Mr. Carlisle was on the witness

stand,—*on July 6, 1937*,—he was asked by his counsel the following question, on direct:

> "Q. Did you—do you know or does the management of any company know how many of its employees belong to the I.B.E.W.? A. *I do not. I do not know myself.*"

Thereupon the examination continued as follows:

> "Q. And the I.B.E.W. furnished the company information as to the membership of its local unions among your employees? A. It has.
>
> Q. I show you this sheet and ask if that is a copy of the data which has been furnished to the management by the I.B.E.W.? A. That's right.
>
> Judge Ransom: I offer it in evidence.
>
> Trial Examiner Gates: There being no objection, it will be received.
>
> (Document referred to received in evidence and marked Respondent's Exhibit 16, Witness Carlisle.)" (Transcript of Record, p. 1212).

"Exhibit 16" in that case, as appears from page 1418 of the same Record, purports to be a tabulation of membership without any signature or authentication of any kind or nature whatsoever. And it should be noted that Mr. Carlisle specifically stated that he did not know what membership I.B.E.W. had among Consolidated employees, notwithstanding the fact that he had that paper-writing in his possession all along. *In other words, Mr. Carlisle was not taking responsibility for its correctness.*

We shall see further below why neither counsel for the Board nor counsel for Petitioner object to its introduction n evidence. What we are concerned with at this point is he use that has since been made of it by counsel for the ther side, and to urge upon this Court the necessity of calling a halt to that use or abuse.

The ghost of the alleged host of 30,000 members first appeared in the briefs of counsel for the other side, in which he matter was referred to as if it were a fact. We thought hen, as we do now, that this claim of membership was of

no legal significance; and we didn't argue the matter, although in the preliminary statement, of preceding the argument, we did call attention, in a footnote to the fact that there is no proof in the record as to the numbers of this alleged host. We have since learned that we were in error in not arguing the point,—for the court having determined that the matter was of legal significance, assumed that the statement of fact in the brief of counsel for the Respondents that the record contained *proof* of the alleged 30,000. That assumption was apparently due to the fact that no objection had been raised to the introduction of this paper in evidence, coupled with the manner in which this was brought to the attention of this Court in a reply brief to which we had no opportunity to answer,—which in fact we did not read until after the argument.* The wording of the passage in question is as follows:

---

* The reply brief in question was handed to counsel for United in the courtroom of the Supreme Court when the case was about to be called for argument; and since under the rules there is no provision for a sur-reply, the brief was put aside and was not actually read until after the argument. And since counsel did not think the matter of legal significance, no attempt was made to counteract in any way what they believed to be an undeserved slur on the contents of their brief as well as a misleading statement as to the contents of the record. The reply brief contained an appendix headed "Summary and Refutation of Matters of Fact Misstated in the Brief for the United," but actually contained what was apparently meant to be "deadly-parallel" columns of alleged misstatements of fact in the briefs of both United and the Board. Among the alleged misstatements in the brief for the United was supposed to be the statement in the footnote referred to in the text, which appeared on page 19 of our brief. The statement in the parallel column set opposite to the quotation from our brief read as follows:

> "*The court below found as a fact*, from the evidence, as to the Brotherhood, that 'As of June 29, 1937, their membership was 30,000 out of 38,000 eligible employees' (R. 1745). The *details of the proofs* are in

> *"It also appears from the evidence, which was received without objection,* that the Brotherhood and its locals comprise over 30,000 or 80 per cent of the companies' employees out of 38,000 eligible for membership."
>
> *Consolidated Edison v. N.L.R.B.*, 305 U. S. 197, 232.

It thus appears that we must share the blame for the fact that "Exhibit 16" became a part of the record in the original case, and are therefore at least partly responsible for this imaginary host of 30,000 members of the I.B.E.W. among the Consolidated Edison employees. But, we respectfully submit, that that is no reason why this imaginary host should be permitted to continue to occupy the battlefield, and to play a role as if it were a real host and not an imaginary one. *It certainly never had any existence in fact.*

---

evidence as Respondents' Exhibit No. 16 (R. 1418). This exhibit was received in evidence *without objection* from counsel for the Board (R. 1212), who did not cross-examine as to it or offer any rebuttal. The Board's decision did not question the accuracy of the facts shown in Exhibit No. 16 (R. 101)." (Last italics in original) (pp. 26-27).

---

Needless to say, there was no more finding of fact by the court below than there was by this Court. The court below made no findings. The reference is to a portion of the opinion of the Circuit Court of Appeals in which the court said, not by way of finding, but apparently as a matter which was either undisputed or not important enough to be disputed, "As of June 29, 1937, their membership was 30,000 out of 38,000 eligible employees." And the context shows that not only was the court not making a finding, but it apparently didn't think the matter of particular importance, since not a word is said about the significance of this fact. And, as this Court well knows, the court below sustained the entire order of the Board, thus clearly showing that *it did not consider this fact of legal significance.* But this Court was clearly led to believe that the Circuit Court of Appeals had made an actual finding of fact based on *"detailed proofs"* appearing in the record.

(c) *Must counsel object to the admission of documents which have no probative value on pain of being held to have admitted the correctness of their contents?*

The question raised by the ghost membership of I.B.E.W. is important not only because the time has come to put a stop to its potentiality for mischief in the further progress of this case, but also because it raises the very important question of the duties of attorneys trying cases before the National Labor Relations Board. When this matter came to trial before the National Labor Relations Board in June and July, 1937, we were under the impression that neither technical rules of evidence nor the technical rules of procedure governing trials in other courts were applicable in proceedings before the Board. Objections of counsel to the admission of evidence were, therefore, looked upon more in the nature of requests to the examiner not to burden the record with immaterial matter; and, when overruled, no exception was deemed necessary in order to preserve one's rights. That technical rules of evidence should not apply is provided for by the Act itself. And it is clear that the Act could not be properly administered if they were to apply. Evidence is therefore offered and admitted "for whatever it is worth." Worthless matter certainly does not acquire probative value by being put into the record. And we respectfully submit that worthless matter does not cease to be worthless because it went into the record without objection being offered to its admission. If we are in error on that, the sooner we find it out the better for the profession as well as for those charged with the administration of the Act.

But we respectfully submit, even under the stricter rules of evidence, such as govern the trials in equity courts, our failure to object to this utterly worthless piece of paper did not give it any probative force. Nor should we even be criticized for having failed to object to it. For, as a matter of fact, there were very good reasons for our failure to object. It must be remembered in this connection *that the paper was not being offered as proof of its contents.* On the contrary, Mr. Carlisle distinctly disclaimed any knowledge of the mem-

bership either by him or by the management of Consolidated Edison, even though they had the paper all along. It was being offered merely for the purpose of showing that a certain claim had been made by I.B.E.W. We need not go into the question as to whether or not we could have objected on the score that it was inadmissible even for that purpose. Suffice it to say, that we didn't care to be technical as to the form in which Consolidated Edison may prove that a certain claim had been made by I.B.E.W. The question therefore arises, was it our duty to object to the introduction of proof of that *claim?* And as to that, we respectfully submit, that the question whether or not the fact of such claim was relevant to the issues was at least arguable. And, we further respectfully submit, that in such situation prudent counsel for the Board or for a complaining union should not object to proof of the fact that such claim was made and run the risk of a reviewing court holding that the employer had not been given an opportunity to prove the entire situation as it presented itself to him at the time when he is alleged to have committed an unfair labor practice. It must be borne in mind that employers are continuously confronted with situations where conflicting claims are made upon them by rival labor unions. Under such circumstances, we respectfully submit, it is perfectly proper for an employer to prove what claims had been made on him by either union before he determined what course of action to take. And it would be unfortunate if it were held that the failure to object to the evidence that a certain claim had been made was tantamount to an admission of the correctness of the claim, or that the proof of the claim had any other probative value than that such a claim was made.

We respectfully submit that even in ordinary courts of law, and especially in equity courts, it is very common to introduce in evidence a notice of claim, and the admission of such notice is never considered proof of anything but the fact of claim even when the notice is admitted without objection. A familiar instance is that of the admission into evidence of the filing of a notice of lien in an action to enforce it. Notices

of lien are properly admissible into evidence. *But no one has ever claimed that the failure of counsel for defendant to object to the admission of such notice is proof of the amount due as claimed in the notice. Certainly no court ever so held. And that even though such notices are usually sworn to.*

We respectfully submit that our failure to object to the admission of the utterly worthless piece of paper known in the main case as Exhibit 16 gave it no probative force. And the time has come to shoo that imaginary army off the record. For even if it were decided that Petitioner has no standing, and the Board make a motion to punish for contempt, it would be met by the same ghost army of 30,000 unless this Court does something to make it incapable of further mischief.

## POINT III.

**The questions what Consolidated Edison did and whether it had a right to do it relate to the merits of the application, with which this Court has no concern on this review.**

Considerable space of the Consolidated Edison brief is devoted to a discussion of the questions as to what Consolidated Edison is charged with doing, whether, as a matter of fact, it did those things, and whether it had a right to do those things which it admits doing.

We respectfully submit that none of these questions are pertinent on this appeal. All of them relate to the *merits* of the application to the court below; and must, therefore, be directed to and argued in the Circuit Court of Appeals in the first instance. Had the court below granted us a hearing on the merits, the arguments now addressed to this Court might have been properly addressed to that Court; and in case of a decision adverse to them respondents might have been entitled to have them reviewed by this Court. The court below having refused to hear the application on its

merits, it is clear that the merits cannot be argued in this Court, since this Court has no original jurisdiction in the matter and its power is concededly limited to a review of the action of the court below. No decision having been made by the court below on the merits, the merits cannot be argued in this Court.

## POINT IV.

**The question as to what relief, if any, petitioner was entitled to is likewise not before this Court.**

In addition to devoting a large portion of their brief to the questions noted under the preceding point, the briefs on the other side devote some space to the question of the relief sought by petitioner in the court below, and to a discussion of the question whether or not petitioner was entitled to that relief under the decision of this Court in the main case.

We respectfully submit that that question is also not before this Court on this appeal. The question whether there has been a violation of a decree of the Court is usually a mixed question of law and fact. It may, under certain circumstances, be purely a question of fact, and under others purely a question of law. Such is clearly not our case, since some of the questions of fact alleged in the petition are controverted by the respondents, and others are claimed to have been done in pursuance to the decree of this Court "upholding" Consolidated Edison's contract with I.R.E.W. None of these questions, we respectfully submit, can be argued on this appeal. Even the questions of law cannot be reviewed in this Court before they had been considered and determined in the court below. It is clear that the question of law as to what relief petitioner is entitled to could not possibly be considered by this Court in advance of any determination in its favor, upon a dismissal of its petition on the ground that it is not entitled to *any* relief for lack of *standing*.

It is elementary that the prayer for relief is not part of the cause of action, and the question of what relief a plaintiff would be entitled to cannot be discussed upon a dismissal of

a complaint, since the dismissal of the complaint decides that the plaintiff is not entitled to *any* relief. Upon an appeal from a judgment dismissing a complaint or sustaining a demurrer thereto, the question whether or not plaintiff was entitled to *all* of the relief prayed for is clearly not germane to the question under review.

*Squiers* v. *Thompson*, 172 N. Y. 652.

The question of the relief to which petitioner would or would not be entitled if the matter of merits had been tried in the court below, would, therefore, not be germane to the question now before this Court even if we were in the position of a plaintiff whose complaint had been dismissed for failure to state a cause of action. A *fortiori* are these matters not germane to the question before the Court in this case in which not only was our complaint dismissed, but it was dismissed not upon the ground that it does not actually state any cause of action, but that we would not be heard no matter what cause of action we stated. In other words, the decision of the court below was, literally, that we could not *come into court.*

The decision of the court below was, *assuming that Consolidated Edison had violated the decree in question, petitioner has no standing in court to present that violation as a grievance upon which it is entitled to be heard.* And that *is the only question before this Court.*

## POINT V.

**No new findings by the Board were necessary as a preliminary to the application to punish for contempt. Nor was the Board authorized to make any new findings without direction from the Court.**

In arguing against the right of the Petitioner to move for the punishment of Consolidated Edison, counsel for that company lay great stress on the alleged necessity of having the Board make findings preliminary to the application to

punish. It is clear that that contention is without merit. Nor would the limitation of the right to move to punish to the Board insure such findings. It is clear that there is nothing in the statute which requires that such findings be made; and, as far as we know no such formal findings were made in any case in which the Board moved. Clearly, the mere petition of the Board to punish is not equivalent to such findings, any more than the formal complaint of the Board is equivalent to findings in the original proceeding, even though the Board of necessity investigates the case prior to making a formal complaint.

It is also clear that many applications to punish for contempt may raise questions of law only,—in which event it would be utterly absurd to require the Board to make "findings". And the present case is an instance in point: If we understand the main argument of our opponents on the question of merits correctly, it is that Petitioner was in fact seeking from the court below an interpretation of the decree involved herein which would amount to an "extension" of the relief granted by that decree. Clearly, that would present a question of law upon which no findings were either required or could possibly be made by the National Labor Relations Board. Surely, it is not for the Board to say what the decree made by the Circuit Court of Appeals under the direction of this Court actually means, but for that Court in the first instance and for this Court ultimately. It would therefore be utterly absurd to submit that question to the Board. We are sure, that had the question been submitted by us to the Board and had the Board attempted to do something about it, either by way of real *investigation* or the making of *findings*, counsel for the other side would have raised the hue and cry that the Board is back at its nefarious practice of hounding the poor employers and the poor A. F. of L. by attempting to reinstate the very portions of its order which the United States Supreme Court had eliminated. A cursory examination of *one* of the questions involved on the application below, which was made a principal issue on the merits in that Court, will illustrate the point.

*A. The Board has made all the findings which it is authorized to make under the Act and which are necessary for the determination of the main question of merits presented to the Court below.*

We respectfully submit that the Board has made all of the findings which it is authorized to make under the law and which were necessary for the determination of the merits of the application raised in the court below. It must be borne in mind that the only findings that the Board is authorized to make are: (a) whether or not an unfair labor practice had been committed by an employer, and (b) what steps are necessary or proper for the purpose of curing the past offenses or preventing the occurrence of the evil in the future. In this case the Board has found, and the courts have sustained the finding, that Consolidated Edison was guilty of unfair labor practices. The Board also found that certain steps or acts were necessary in order to rectify past injuries and prevent their recurrence in the future. On this point this Court failed to approve one of the Board's findings; and, therefore, eliminated it from the order made by the Board. Just what the action of this Court in that regard meant will be discussed in more detail further below. Suffice it to say here, that this action continued the dispute which was originally tried before the National Labor Relations Board,—Petitioner claiming that Consolidated Edison was now using the decree of this Court as a cloak for the continuance of the most important unfair labor practices originally complained of; while Consolidated Edison claimed that what was previously an unfair labor practice had become permissible under the decision of this Court. That was the main problem before the court below, although not the only one. *But it could have been the only question presented to the court below*,—as is now in effect claimed by Respondents, when they discuss the merits of the application to the court below. Certainly, it would be utterly absurd to say that anything further was necessary to be done by the Board before this question could be presented to the court below in the first instance, or to this Court ultimately on review

of the action of the court below. And the fact that we claimed that there were other questions involved,—namely, that Consolidated Edison was back at its old game of continuing the old unfair labor practices even where it couldn't possibly cover them up with the alleged protection of the decree of this Court, makes no difference. The problem whether or not a labor union has independent standing to bring a question of the violation of a decree to the attention of the Court which has made it, asking for relief, cannot be made dependent on the facts of a particular controversy. It must cover them all, including a situation like the one which respondent claims is actually presented in this case,—namely, a pure question of the interpretation of the decree of the Court.

As to such a situation, it cannot possibly be claimed that any further findings by the Board are necessary. And if such findings are not necessary in *every* case, the principal argument for the necessity of the Board's intervention in *all* cases is completely answered. The legal problem involved must then be resolved by permitting either the Board or the union to come to court, *presenting* its grievance; and it would then be for the Circuit Court of Appeals to decide whether or not further intervention by the Board is necessary.

In this connection, we respectfully submit to the Court that the suggestion by counsel for Consolidated Edison that the alternative was between a preliminary examination and *findings* by the Board, on the one hand, and a decision by the Court on affidavits, on the other, flies in the face of the well-established practice of equity courts on such motions. Where the questions presented are not purely legal and the papers present issues of fact, the usual practice is to either direct evidence to be presented before the Court itself or such evidence to be taken by a master on its behalf. The responsibility is that of the Court to decide for itself whether or not it could decide the matter on the papers before it, or more light was needed, and if so, upon the means whereby that is to be obtained. In this case, the Court could, of course, have availed itself of the services of the Board, since the Board had offered its services. We do not mean to say that such

offer by the Board was absolutely necessary,—that is a question of the interpretation of the Act a decision upon which is not necessary for the determination of the question before the Court. One thing is clear, however, that the Board itself could not proceed to make either any *real investigation*,—i. e., an actual trial of the issues of fact, if there were any,—or any *findings*, except upon the order or direction of the Court.

*Ford Motor Co.* v. *N.L.R.B.*, 305 U. S. 364.

B. *The principal question presented to the Court below was one on which the Board could not, with propriety, make any findings.*

The utter absurdity of requiring findings by the Board as a condition of the right to apply to the Court for relief in the event of a violation of a decree such as is involved herein becomes even more apparent when the main controversy on the merits is considered. We shall not discuss those merits here, but merely point out what the controversy was about, in order to illustrate our contention that the main prop of the argument on the other side for limiting the right of moving to the Board cannot possibly sustain the weight of the edifice which it is intended to support. We have already called the attention of the Court to the fact that a large part of the controversy below, perhaps its most important part, turned around the question whether what Consolidated Edison did was in *pursuance* of the decree or in *violation* thereof. That, as we have already stated, is purely a question of law which the Board could not possibly pass upon. But behind that question of law, there lay a question of opinion as to the kind of relief the particular situation demanded, which made the Board particularly diffident* in

* Counsel for Consolidated Edison say in their brief that our papers show that our application was made without the Board having passed upon its propriety, and it is broadly hinted that the reason was that the Board would probably have disapproved of such application. As we view the law, that question is not of the slightest importance on the ques

moving in the matter, since it presented a point of difference between it and this Court. For it must be remembered that the most important matters complained of on this application are claimed by the respondents to have been done by them under the portion of this Court's opinion which is supposed to have "upheld" their contracts with the I.B.E.W. which the Board had ordered discontinued or "disestablished".

It will be recalled that at the last day of the original hearing before the Board (except for the special session on July 6th for the taking of the testimony of the witnesses Carlisle and Dean) Consolidated Edison produced certain contracts which it claimed to have entered into with I.B.E.W. while the hearings before the Board were pending. The Board having found that Consolidated Edison and I.B.E.W. entered into a scheme to deprive the employees of Consolidated

---

tion now presented to this Court for review. But having been taught by past bitter experience not to disregard certain matters because of our own notions as to what is or isn't before the Court on an argument, we take this occasion to state that, as a matter of fact, our application was made upon the advice of the General Counsel for the Board, who was of the opinion that Petitioner had the right to make such an application, and that it would be *advisable* that it should do so. Whether counsel for the Board was actuated in giving this advice by a desire to save the Board labor or the workers involved delay in bringing their grievances to the attention of the Court, or because he did not care to have the Board charged with an attempt to enforce a portion of its order which had been eliminated by this Court, is, of course, a matter on which we can have no opinion. We may point out, however, that while we are now being charged with attempting to "extend" the decree obtained by us, there can be no doubt of the fact that had the Board brought the present proceeding, it would have been charged with much worse offenses,—in all probability with attempts to enforce orders which this Court had disapproved. And we certainly cannot blame the General Counsel for the Board, in view of the present concerted attack upon the Board on all sides, in being rather *diffident* about bringing the proceeding when counsel for the union involved were ready to do so.

That the failure on the part of the Board to act was *not* due to any doubt as to the propriety of initiating such a proceeding is sufficiently proven by the text of its "Response".

Edison of their rights of self-organization and collective bargaining, and viewing the course of conduct of Consolidated Edison from the day of the announcement by Mr. Carlisle, the Chairman of its Board, while the concededly company unions were still in existence and I.B.E.W. had practically no members among the Consolidated employees, that he "recognized" the I.B.E.W. as the collective bargaining agency for all of the Consolidated employees, and up to and including the signing of the contracts in question, as one continuous attempt to deprive the Consolidated employees of their right to collective bargaining, concluded that those contracts must be "disestablished" as part of the relief which the situation demanded. It was of the opinion that that step was absolutely necessary in order to make real collective bargaining possible.

4 N.L.R.B. 71, 94.

The Circuit Court of Appeals was of the same opinion, but this Court disagreed and ordered that portion of the Board's order eliminated. *Why* this Court eliminated that provision, and what the elimination of that provision *actually meant*, gave rise to the main difficulty which necessitated the application to the court below. Briefly stated, the contentions of the respective parties were these:

*Petitioner* claimed that in directing the modification of the order of the Board, this Court was actuated by two considerations: (a) the fact that no issue had been properly raised with respect to those contracts, and that, therefore, the Board could not invalidate them as an independent decision, since no trial of that issue had been had; and, (b) that such disestablishment was not necessary for the purpose of giving proper relief as to the unfair labor practices which had actually been tried and as to which Consolidated Edison had actually been found guilty, since the contracts in question on their face claimed to apply only to I.B.E.W. members and not to be "exclusive" contracts,—i. e., contracts entered into by an exclusive bargaining agency pur-

posing to represent all of the employer's employees.* The Respondents, on the other hand, claimed,—or at least so we interpret their claim,—that this Court had actually tried the issue involved in our attack upon the contracts in question and sustained them after such trial. Respondents then correlate this supposed *decision* of this Court with this Court's supposed *finding* of fact that I.B.E.W. represented 80% of Consolidated Edison's employees, and from the combination of the two they deduced the right to consider as *exclusive* the contracts which they had claimed before this Court only related to I.B.E.W. members.

The main charge presented to the court below by Petitioner, around which all the other charges revolved and to

---

* The pertinent portions of the opinion of this Court are as follows:

"Apart from this question of notice to the unions, both the companies and the unions contend that upon the case made before the Board it had no authority to invalidate the contracts. Both insist that that issue was not actually litigated, and the record supports that contention. The argument to the contrary that the contracts were necessarily in issue because of the charge of unfair labor practices against the companies, is without substance * * * But the Board says that on July 6th (the last of the contracts having been made on June 16th) the companies amended their answer, stating that the making of the contracts had rendered the proceeding moot, and that this necessarily put the contracts in issue. We cannot so regard it. We think that the fair construction of the position thus taken on the last day of the hearings was entirely consistent with the view that the validity of the contracts had not been, and was not, in issue * * *

"Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. * * * They simply constitute the Brotherhood the collective bargaining agency for those employees who are its members * * *

"The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice." 305 U. S. 234-238.

which they were subsidiary, was that Respondents proceeded *as if* this Court had decided that the contracts in question were such as, under the Act, only an exclusive bargaining agency may make or enforce. That such claim was actually made by Respondents, or at least seemed to us to have been made, is shown by Mr. Carlisle's affidavit, to which frequent,—and as we believe improper,—reference is made on the briefs for the Respondents. In that affidavit Mr. Carlisle says:

> "About a month after the entry of this Court's Order of January 21, 1939, the I.B.E.W. complained to the Companies that the I.B.E.W. was not being accorded the status to which it was entitled, under Section 9(a) of the Act *and the Opinion of the Supreme Court*" (R. 32).

The Court will recall that Section 9(a) of the Act deals with contracts which may be made only by *exclusive bargaining agencies*. That sub-section is as follows:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be *the exclusive representatives of all the employees* in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

Clearly, at least the I.B.E.W. claimed that under the decision of this Court, it was entitled to be the exclusive bargaining agency for all of Consolidated Edison's employees. And since there is no question of the close collaboration between the I.B.E.W. and the Consolidated Edison Companies, there is at least a fair inference,—certainly worthy of inquiry by the court below as to its correctness,—that Consolidated Edison Companies were actually proceeding *as if* I.B.E.W. were *the exclusive bargaining agency for all Consolidated Edison employees.*

That the main reliance of both Consolidated Edison and I.B.E.W. was on the decision of this Court is self-evident, when we bear in mind the law of our subject. It is not only

clear from the Act itself but settled by adjudication that an exclusive bargaining agency cannot, in any event, be constituted under Section 9(a) by the action of the employer and a labor union, no matter what the proportion of that particular employer's employees are members of the labor union in question, for that section of the Act has no reference whatever to the number of employees of a *particular employer* whom the union represents, but the number of employees in a *particular unit* the union represents; and the Act itself provides that the National Labor Relations Board is the only agency that can determine what is a proper unit, *and that it must do so in each and every case.* This is likewise too explicitly stated in the Act to permit of any argument. The Act says in Subdivision (b), which immediately follows upon the provisions of Subdivision (a) just quoted:

> "The Board shall decide *in each case* whether in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

That the two subdivisions just quoted mean just what they say,—namely, that the mere fact that a certain labor union represents a majority, or even all, of the employees of a particular employer, does not make that union the exclusive bargaining agency for the employees of that employer,—has been recently decided in a well-considered opinion by the Court of Appeals of the District of Columbia, with the apparent approval of this Court, since this Court did not express any dissent from those views, although the case was up for review in this court.

> *Fur Workers Union* v. *International Fur Workers Union*, 105 F. (2nd) 1, affirmed by this Court, Dec. 11, 1939.

Also, if reliance were had merely on the provisions of the Act itself, there would have been no occasion for Mr. Carlisle in his affidavit in the court below to refer to the "opinion of the Supreme Court." Clearly, therefore, what Respondents relied on as their main defense in the court below, in so far as the merits were concerned, was the opinion of this Court as interpreted by them. And it is this question, we are now told, Petitioner could not argue in the court below without previous investigation or findings by the Board.

That Congress could not have intended such an absurdity is self-evident. Of course, had Congress expressly said what counsel for the Respondents say it said, that would have been the end of the matter. We do not claim that this Court has any power to change the Act. And we certainly do not ask it to do so.

What we claim is that everything in and about the Act, *and every principle of our legal system*, with which the lawmaker is presumed to be familiar and have in mind, require the conclusion that Congress had intended that the rights granted by it to workers and workers' organizations should be enforced at their behest; and that when it had been finally established, through a long and laborious process, that their rights had been invaded, and a decree entered which commands cessation of such invasions, the workers and the workers' organizations for whose protection these rights have been declared, may apply to the court making the decree for its *effective* enforcement.

And anyone who seeks to place upon the Act an interpretation which would defeat that purpose has the burden of proving it by better arguments than such as would make nonsense of the Act, thereby assuming that Congress did not know what it was about.

## POINT VI.

**That the Board could move to punish for a civil contempt, if it can do so under the act, is no argument against petitioner having that right.**

In our main brief we had expressed some doubt as to whether the National Labor Relations Board could move to punish a violator of an enforcement decree as for a civil contempt, as distinguished from criminal contempt. In their answering briefs, counsel for Consolidated Edison go to considerable length to prove that the Board has that right. We are not disposed to quarrel with that, even though the arguments presented do not seem to us conclusive.* For our part, we wish the Board had that power, for an examination of the records in which the Board has actually moved to punish a violator of an enforcement decree for contempt shows that all of them were cases in which the labor unions making the charge had not seen fit to, or could not afford the expense, of making themselves parties to the enforcement proceedings either in the Circuit Court of Appeals or in this Court; and it would be a pity if the Board could not, in such a case, move either by way of criminal contempt or civil contempt, as may be best for the interest of the workers involved. The right of the labor union directly affected to move to punish a violator of an enforcement decree is no more incompatible with a similar right in the Board than is the right of the labor union to make itself a party to the original

* Since the receipt of the brief of counsel for the Consolidated Edison we have reread the opinion of the Circuit Court of Appeals for the Seventh Circuit in the case of *Federal Trade Commission* v. *McLean* (94, F. [2d] 802) and the opinion of this Court in *McCrone* v. *U. S.* (307 U. S. 61), and we are not prepared, without further study of the records and briefs in the two cases, to say whether or not this Court intended to overrule the decision of the Circuit Court of Appeals in the *Federal Trade Commission* Case or merely to distinguish the *McCrone* Case, since in that case the United States was acting as a private party.

enforcement proceeding brought by the Board. While the statute expressly gives the right to be heard only to an "aggrieved party",—i. e., a party aggrieved by the order of the Board,—it has been recognized both by the Board and the courts that the statute implicitly recognizes the right of the union which preferred the charges to be heard *alongside and independently of* the Board in any proceeding to enforce its own rights or the rights of its members.

## POINT VII.

**The application to the court below which resulted in the order under review was made in the enforcement proceeding to which petitioner actually was a party.**

The last legal proposition advanced by counsel for Consolidated Edison, is, that an application to punish for a civil contempt is merely a continuation of the main suit; and in a case like the present one it is merely a step in the enforcement proceeding. In that they are undoubtedly correct, and the two cases cited by them in this connection seem to us to dispose of any doubt as to the right of this Petitioner to make the motion which resulted in the order now under review. These cases are:

*Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418.

*N. L. R. B.* v. *Hopwood Retinning Co.*, 104 F. (2d) 302.

It is therefore sufficient for us to refer to those two cases, and to make the very quotations which counsel on the other side make from the opinions in those cases in order to definitely dispose of the arguments on the other side. In the first of these cases this Court said:

> "Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause."

*Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418, 444-445.

And in the second case cited the Circuit Court of Appeals for the Second Circuit * said:

> "As a proceeding for civil contempt, this is therefore properly a continuance of the earlier action in this Court *and is a step in the enforcement of our previous judgment.* Hence it was correctly instituted by motion served upon the counsel appearing for the parties in the record."
>
> *N. L. R. B.* v. *Hopwood Retinning Co.*, 104 F (2d) 302, 305.

And since that case has been cited as authority by the other side, and as also relied upon by us, we may call the attention of the Court to the fact that in that case, although the Board was the movant, the Court found it necessary to refer the matter to a special master in order to make the *findings* which the Court found it necessary to have made before it gave its decision. The disposition of that case made by the unanimous Court was:

> "An order will be entered adjudicating John A. Hopwood, the Hopwood Retinning Co., Inc., and the Monarch Retinning Co., Inc., in contempt of the order of this Court of July 26, 1938, and the proceeding will be referred to Walter H. Pollak, Esq., of New York City, as special master, to make *findings* and file his report after due *hearing.*"
>
> *N. L. R. B.* v. *Hopwood Retinning Co.*, 104 F. (2d) 302, 305.

This, it would seem to us definitely disposes of both, the argument from the necessity of findings and the argument from the necessity for a hearing.

It would also seem to us that the two cases just cited dispose of the question before this Court,—at least as far as the present case is concerned, since we were an actual party to the main action or enforcement proceeding in the Circuit Court of Appeals as well as in this Court.

---

*But the Bench being differently constituted, and the Court speaking through Judge Clark.

As already stated, the appendices to this brief contain a full statement of the various steps in the litigation from the time of the filing of the complaint to the final decision of the matter in this Court; and that record shows that at each step in the litigation, whether before the National Labor Relations Board or before the courts, Petitioner (under its former name of United) was recognized as a party and accorded full standing as such. It appearing by its own counsel and made independent arguments whenever its counsel deemed it necessary,—which actually was whenever any question of law arose and argument was required. It also shows that our opponents, the very counsel who now appear before this Court on the other side, recognized the full standing of Petitioner as a party throughout the proceedings, and so entitled their briefs throughout (this being in accordance with the official title which the case has had throughout), and gave Petitioner's counsel notice of every step they made in the proceeding describing Petitioner either as "intervenor" or "respondent" or both, as the case may be. We shall therefore not burden this Court by reciting these matters here, but shall limit ourselves to the citation of the last entry on that long record,—which shows the standing accorded to Petitioner by this Court. That entry relates to the appearances at the argument when the cause was last before this Court, and is as follows:

> "Mr. Louis B. Boudin, of New York City, argued the cause and filed a brief for *respondent* (intervener) United Electrical and Radio Workers of America."
>
> *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197.

## POINT VIII.

### Certain Cases Distinguished.

It is manifestly impossible to discuss here all of the cases cited by the two sets of counsel on their respective briefs. Fortunately, wherever cases are not merely cited but actually

quoted from, their inapplicability to the case at bar becomes manifest. Some cases are cited, however, without quotation from opinion, and with the general statement that they hold something or other which is applicable to our case. We shall limit the discussion here to two of these cases,—one in this Court and one in the Circuit Court of Appeals for the Seventh Circuit. They are fair samples of the manner in which cases are cited on the briefs of counsel for the other side, but the reason for picking them out of the rest is that they are cited more than once,—the case in this Court being cited twice, and the case in the Circuit Court of Appeals no less than four times,—showing that counsel for the other side considered them particularly important. In fact, at one place counsel say that the case in the Circuit Court of Appeals just referred to holds the very proposition laid down in the order here under review. In addition to those two cases, we shall also consider the other four cases cited on page 29 of the brief of counsel for Consolidated Edison, which, they claim show that the Courts of Appeal of the Fifth, Sixth, Seventh, and Ninth, Circuits are in accord with the decision of the Court of Appeals of the Second Circuit as embodied in the order here under review.

### A. *The Doctrine of the Sprunt Case.*

The case from this Court referred to is that of *Sprunt & Son v. U. S.*, 281 U. S. 249, which is supposed to have held all kinds of things militating against our position. We respectfully submit that that case does not contain anything which in the remotest degree contravenes any position we have taken in this case, or which in any way militates against the rights asserted by Petitioner herein. In order to make this discussion as brief as possible, we shall simply quote that portion of the opinion of this Court in that case from which counsel for respondent have quoted an isolated sentence, or rather, half sentence. That passage is as follows:

> "Such a suit (i. e., a suit to vacate an order of the Interstate Commerce Commission) can be

brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so.

"Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy."

*Sprunt & Son v. United States*, 281 U. S. 249, 255-256.

### B. *The Doctrine of the Blankenship Case.*

The second case referred to is that of *Blankenship v. Kurfman* (96 Fed. 2nd 450); and even more than the *Sprunt* case, it is cited for all kinds of propositions,—including the proposition that Petitioner has no standing in court to move for the punishment of Consolidated Edison for contempt. As a matter of fact, all that that case decides, is, that an action by one labor union against another, for an injunction in a jurisdictional dispute, involves a "labor dispute" within the meaning of the Norris-LaGuardia Act. Just what that has to do with our case is difficult to understand. And it

is apparent that the only excuse for citing it four times, and expressly including it in the list of cases which are supposed to show that other Circuit Courts of Appeal have held the same doctrine as that of the Second Circuit, as laid down in the order here under review, is a doctrine which may be called the doctrine of *in extremis*, sometimes availed of by counsel,—but always strongly disapproved by the courts,—of citing isolated sentences out of their context if the language used apparently gives color to the contention of the counsel making the quotation.

In this case, the situation was the one presented to this Court when present counsel last appeared before this Court, where counsel for a labor union attempted to argue that the National Labor Relations Act had abrogated the Norris-LaGuardia Act. In answer to that contention, the Court of Appeals said:

> "The general purpose of the National Labor Relations Act is to provide methods of preventing or eliminating certain 'unfair practices' which have heretofore characterized the relation of employer and employee, and which have obstructed, or tended to obstruct, the free flow of commerce. The act creates certain rights and duties as between employer and employee and provides the procedure necessary to give effect thereto. It seems clear that the only rights which are made enforceable by the act are those which have been determined by the National Labor Relations Board to exist under the facts of each case; and when these rights have been determined, the method of enforcing them which is provided by the Act itself must be followed. And we find no provision in the act which can be construed as intending to create rights for employees which can be enforced in federal courts independently of *action* by the National Labor Relations Board."
>
> *Blankenship* v. *Kurfman*, 96 F. (2d) 450, 454.

It is clear that the "action" referred to by the court means the kind of action as has already been taken by the Board in this case. In other words, it supports the position which we took and argued at considerable length in our brief in

the *Fur Workers* Case,—namely, that a labor union and the employer cannot get together and enter into a contract on the plea that the contracting union represents a majority of the employees of that employer, and, therefore, allegedly within the provisions of Section 9(a) of the National Labor Relations Act, and thereupon apply to the courts for an injunction to restrain the competing union on the ground that it is engaged in a violation of our Act. That that position does not in any way militate against the position of the Petitioner herein is self-evident. On the contrary, as appears from an earlier portion of this brief, it is our contention that the doctrine of the *Fur Workers* Case cited in an earlier portion of this brief, which is also the doctrine of the *Blankenship* Case, is an important prop to our position in the court below, when the merits of this case come to be heard, although it has no relation whatever to the legal problem now before this Court.

C. *The cases decided under the National Labor Relations Act which, it is claimed, support the contention of the other side.*

There are four cases decided under the National Labor Relations Act, which, counsel on the other side claim, are applicable to the case at bar. We shall discuss these cases in the order in which they were decided, since some of the later cases referred to the earlier ones as authority.

In this order, the cases are as follows:

*Agwilines, Inc. v. National Labor Relations Board*, 87 F. (2d) 146.

*National Labor Relations Board* v. *Carlisle Lumber Company*, 99 F. (2d) 533.

*National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658.

*National Labor Relations Board* v. *Colten, et al.*, 105 F. (2d) 179.

A mere glance at the reporter's headnotes to these cases clearly demonstrates the fact that the problem now before

this Court was not involved in any of them. But it is claimed, however, that these cases lay down the general proposition that the National Labor Relations Act does not create any "private rights",—from which, it is claimed, it necessarily follows that the order appealed from was right. We need not discuss here the question of the logical necessity of the conclusion sought to be drawn from the major premise, since an examination of the cases will clearly demonstrate that no such major premise was laid down in any of them.

The first of these cases, the *Aquilines* Case,—Circuit Court of Appeals, Fifth Circuit, December, 1936,—dealt with the problem of the alleged unconstitutionality of the National Labor Relations Act by reason of the power granted to the Board to order back pay without a trial by jury. In this connection the court said:

> "A short and simple answer to this contention is found in the fact that as between employer and employee the statute confers no right of action triable by a jury or otherwise. No provision in it authorizes an employee to make claim. The act does not purport to confer, it does not confer, private rights. It is only to rights and remedies as they were generally known and enforced at common law by jury trial that the amendment applies."
>
> *Aquilines Inc.* v. *N. L. R. B.*, 87 F. (2d) 150.

It is clear that "private rights" was used by the court as synonymous with *right of action at common law*. At any rate, that was the only question involved in the case, and *dictum* on any other point would be *obiter*, if any such *dictum* had actually been made. Clearly, there are many private rights and private suits to which the constitutional provision there under consideration does not apply.

In the second case cited, the *Carlisle Lumber Co.* Case, Circuit Court of Appeals, Ninth Circuit, October, 1938,—the question involved was the extent of the power of the Board to order back pay,—the particular question being whether or not the Board could order back-pay in a case where it had not ordered reinstatement. The decision was

that the Act did not confer a right to back pay which would entitle an employee to such payment apart from and independent of the power given to the Board to prevent unfair labor practice by ordering reinstatement. This case clearly did not deal with the problem as to who may invoke the power of enforcement. The only connection in which the problem of private right was considered was whether the right to back pay was an independent right in the sense that it entitled an employee to payment independently of the prevention of an unfair labor practice. The other question was the power of the Board to order payment without reinstatement as a means of preventing an unfair labor practice. Neither of these questions is before this Court. And what was said there has not the remotest bearing on the problem before us.

The same is true of the third case cited, that of *N.L.R.B.* v. *Hearst*,—Circuit Court of Appeals, Ninth Circuit, March, 1939. That case also involved a problem of the extent of the power of the Board to order back pay,—with respect to the point of time. In that case one of the employees whose reinstatement with back pay the Board had ordered died after the decision of the Board but before the court had made an enforcement order. The question was whether or not the Board could amend its order by directing payment of the back pay to the deceased employee's estate; and if so, up to what time. The decision was that the Board could direct payment of back pay to the deceased employee's estate; but only to the time of the making of its order, and not beyond that. In that connection the court said:

> "The Board intimates that *a private right of action* accrued to Armstrong which survived his death. We think Congress did not intend to create any private right." (Italics ours.)
>
> *N.L.R.B.* v. *Hearst*, 102 F. (2d) 658, 664.

It is clear that here, again, the court used "private right" as synonymous with "private right of action at common law",—which is clearly not the problem before this Court.

And there is certainly nothing in the last case cited which even remotely bears on the matter before this Court. Not only was the problem before the Court in that case entirely different from the problem before this Court, but nothing was said in the opinion in that case that has any bearing whatever upon the present case. The problem before the court in that case was, whether or not an unfair labor practice proceeding under Section 8 against a partnership is terminated by the death of one of the partners, on the theory that *at law* a partnership is a separate entity which is terminated by the death of one of the partners. The answer of the court was in the negative. Counsel for Consolidated Edison quote in a footnote a paragraph from the opinion. We reproduce that paragraph and the next one which shows the context. Together they read:

> "This contention, however, ignores the essential nature of regulatory statutes of the class here considered, and the scope and purpose of administrative orders made in exercise of powers conferred by such legislation. They are to implement a public social or economic policy not primarily concerned with private rights, and through remedies not only unknown to the common law but often in derogation of it. * * *
>
> "In this view of the Act it seems to us unimportant that the proceedings were styled as against Colten and Colman, co-partners, doing business as The Kiddie Kover Company. It is the employing industry that is sought to be regulated and brought within the corrective and *remedial provisions of the Act* in the interest of industrial peace."
>
> *N. L. R. B.* v. *Colten*, 105 F. (2d) 179, 182-183.

It would seem a mere waste of time to attempt to prove that nothing said by the court in that case has the slightest bearing on the problem before this Court. But the fact that counsel on the other side are reduced to the necessity of relying on that kind of cases, we respectfully submit, is in itself proof that their contention is utterly untenable.

## POINT IX.

### The Securities and Exchange Act Distinguished.

In the brief submitted by counsel for the Consolidated Edison in opposition to our application for certiorari, they referred to four Acts of Congress, as allegedly proving that whenever Congress wanted to create private rights it expressly said so in the act creating those rights. We have discussed those acts in our main brief, showing that there were special reasons for the express provisions of those acts,—reasons which do not apply to our case, and which do not contravene our contention that when rights are created by an Act of Congress, no special provision is necessary in order to make those rights enforceable in our courts. In their brief on this argument, counsel mention another Act in connection with the same argument,—the Securities and Exchange Act.*

An examination of the Securities and Exchange Act (48 Stat. 77; 49 Stat. 129), clearly demonstrates that the reason for the specific provisions indicated by counsel for Respondents were the same which required the insertion of the specific provisions of the four other Acts; and that the arguments which we advanced in our main brief with respect to the other four statutes apply equally as well to the Securities and Exchange Act. The sections pointed to by counsel on the other side are 77-l and 77-t(b). An examination of those sections shows that the reason for inserting an express provision as to the existence of civil liability to the pur-

* Counsel also refer to a section, Section 16(12) of the Interstate Commerce Act, which is one of the Acts mentioned by them in their brief in opposition to certiorari and discussed by us in our main brief. The section of the Interstate Commerce Act referred to in their brief in opposition to certiorari and discussed by us in our main brief (p. 36) is Section 9. They now add Section 16(12). But an examination of the latter section clearly shows that it was inserted because of the presence of Section 9, and that the argument which answers the presence of that section also answers the presence of the latter.

chaser is due to the fact that the standard of proof as well as the measure of liability provided in this Act is different from the standard of proof or measure of liability at common law. Without going into a detailed discussion as to the rather complicated question with respect to the problems of evidence and presumptions which differentiate the provisions of the Securities and Exchange Act from the common law in this respect, it is sufficient to point to the last provision of Section 77-l, which permits the purchaser—

> "* * * to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages *if he no longer owns the security.*"
>
> U. S. Code, Title 15, Section 77-l(2).

We respectfully submit that this provision changes the common law which would be applicable to the situation but for this provision, in two respects: In the first place, it permits the purchaser of the security to recover the purchase price plus interest,—instead of damages as is the rule under the common law in cases of the sale of personal property induced by fraud.* On the other hand, it limits the right to the recovery of damages to cases where the purchaser no longer owns the security,—contrary to the common law rule which gives one induced to purchase personal property by fraudulent representations the right to keep the property and recover the damages.

---

* There is, of course, the right of rescission at common law, under certain circumstances. But we believe that the right of rescission given by the Securities and Exchange Act is much broader than that which exists at common law.

## POINT X.

### Earlier Statutes as Models, and the Problem of "Assimilation."

Much has been said on the other side to the effect that Congress, in enacting the National Labor Relations Act, had in mind particularly the Federal Trade Commission Act, and "modelled" the former upon the latter. We respectfully submit that all such speculations are somewhat idle. Not that earlier statutes have not been thought of by Congress in the enactment of this piece of legislation. But, merely, that it did not do any more so than in any other case. The history of any piece of legislation is of interest in connection with its interpretation, as is the general body of the law of which it was to become a part. But there is certainly not the slightest warrant for the statement that our Act was modelled after the Federal Trade Commission Act. We respectfully submit, with all due respect to those who have made the contrary assertion, that, if anything, our Act was certainly *not* modelled after the Federal Trade Commission Act. It could not very well be in the nature of things. If there was any statute at all after which it was modelled, it was the Railway Labor Act, and not the Federal Trade Commission Act. Not only are the *reasons* obvious, but, we believe, we are warranted in our assertion by the very reports which have been used,—improperly, as we believe,—in an attempt to prove that the Federal Trade Commission Act was the "model" which Congress followed. Lack of time did not permit us to go over very carefully the two reports in question. But upon cursory examination, we have found only one place in the Senate Report in which the Federal Trade Commission Act is referred to, and quite a number of places in which the Railway Labor Act is referred to. Furthermore, the specific reference to the Federal Trade Commission Act in itself proves, at least, that it was not an *exclusive* model, and that in so far as it was a model at all it was only so with respect to procedure before the Board. On the other hand, the Rail-

way Labor Act is continuously referred to as the model for the rights created by the statute. The reference to the Federal Trade Commission Act occurs on page 14 of the Senate Committee's Report (Report No. 573, 74th Congress, 1st Session), and is as follows:

> "*Section 10. Procedure before the Board.*—This is the most important procedural section. Despite the wide-spread charges that the bill invokes novel procedure and vests unusual powers in an administrative agency, the bill is modeled closely upon numerous Federal Statutes setting up administrative regulatory bodies of a quasi-judicial character. The common procedure is so well known that the committee deems it unnecessary in substantiation of this statement to refer to any analogous statutes save the Federal Trade Commission Act, section 5."

It will be noted that the "modelling" is solely with respect to procedure,—and that even as to that "the bill is modelled closely upon *numerous* Federal Statutes."

On the other hand, the Railway Labor Act is referred to in connection with the creation and securing of the right of collective bargaining in Section 7, and in connection with Section 8(a) which prohibits the violation of those rights generally (Report, p. 9).

It would seem to us that this contrast in the use of the two acts as "models" is a sufficient indication as to the manner in which our Act ought to be interpreted. And the other places in which the Railway Labor Act is mentioned only strengthen the conclusion to be drawn from that contrast.

We therefore respectfully submit that the interpretation of our Act, in so far as the basic rights given and secured thereby are concerned, should be guided by the interpretation of the Railway Labor Act,—which means that the procedure under our Act,—except the procedure before the Board,—should be "assimilated" to that under the Interstate Commerce Act, rather than the Federal Trade Commission Act, at least whenever "procedure" means *the right to come into court*. That the Railway Labor Act creates private rights

which the beneficiaries of those rights may themselves vindicate in our courts is unquestioned.

*Texas & N. O. R. Co.* v. *Brotherhood*, 281 U. S. 548.
*Virginian Railway Co.* v. *System Federation*, 300 U. S. 515.

## CONCLUSION.

It is clear that whether we consider the language of the statute itself, or the nature of the evil which the statute was designed to remedy, or the nature of the remedy provided by the Act for the curing of that evil, we must come to the conclusion that the labor unions making the charges of unfair labor practice and for whose benefit, or for the benefit of whose members, the enforcement decree was made, ought to have the right to apply to the court making the decree to punish the offender for contempt in case the decree is violated. And this is particularly true in a case like the present one, when the union has not only presented the charges and secured the decree, but has actually expended time and money in the securing of that decree, and was represented as a party by its own counsel not only in the securing of the order of the Board but also in securing the decree directing the enforcement of that order.

Dated, New York, January 25, 1940.

Respectfully submitted,

LOUIS B. BOUDIN,
Counsel for Petitioner.

Address of counsel:
20 West 43rd Street,
New York City.

## APPENDIX A.

### The Formal Standing and Extent of Actual Participation of Petitioner and Its Counsel in the Litigation Which Resulted in the Decree Claimed to Have Been Violated by the Respondent Companies.

1. Some time prior to May 12, 1937, United filed with the National Labor Relations Board certain charges, which resulted in the Board's making the formal complaint dated May 12, 1937, which was the first formal step in the litigation. (4 N. L. R. B. 71 *et seq.*)

2. The complaint of the Board was entitled "In the Matter of Consolidated Edison Company of New York, Inc., and its affiliated companies, etc., *and* United Electrical and Radio Workers of America, affiliated with Committee for Industrial Organization"; and this was the title under which all of the proceedings were had before the Board, and under which its formal decision and order were made. (4 N. L. R. B. 71. Transcript of Record in *Consolidated Edison Co.* v. *N. L. R. B. et al.*, pp. 133, 244, 404, 544, 696, 824, 967, 1104, 1194.)

3. United was represented by its own counsel at and participated in all of the hearings had before the National Labor Relations Board. (4 N. L. R. B. 71, 72. Transcript of Record in *Consolidated Edison Co.* v. *N. L. R. B. et al.*, pp. 133, 244, 404, 544, 696, 824, 967, 1104, 1194.)

4. The Board in its decision and findings specifically referred to Petitioner's character, and to the fact that the Board's complaint was *founded* upon Petitioner's charge (4 N. L. R. B. 71, 83); and in its order specifically provides for the protection of Petitioner (4 N. L. R. B. 108).

5. Before the taking of testimony before the Board, the Consolidated companies appeared specially and moved to dismiss the complaint. The special appearance and notice

of motion is also entitled in the manner stated above,—i. e., including the name of United as a party to the proceeding,—and is directed to the Regional Director of the Board *and* United.

6. On November 20, 1937, counsel for Petitioner were served by counsel for Consolidated Edison companies with a copy of the latter's petition for review, which had been filed in the Circuit Court of Appeals on November 18, 1937, and also with an order to show cause on an application for a stay pending the hearing of their petition by the Circuit Court of Appeals. *This was prior to the entry of the order on behalf of Petitioner in the Circuit Court of Appeals.*

7. The I. B. E. W.'s petition to the Circuit Court of Appeals for review of the Board's order, also admitted that the petitioner herein had been a party to the Board's proceedings. The petitioners stated, in their Petition, that they

> "respectfully pray this Honorable Court to review and set aside said Final Order entered and issued on November 10, 1937, by said National Labor Relations Board, in a proceeding entitled In the Matter of Consolidated Edison Company of New York, Inc., and its Affiliated Companies (hereinabove named) and United Electrical and Radio Workers of America, Affiliated with the Committee for Industrial Organization, and designated upon the Records of said Board as Case No. C-245."

8. On December 8, 1937, present counsel for Petitioner appeared in the Circuit Court of Appeals on the argument of the motion for a stay of proceedings, and argued the said motion on behalf of Petitioner. In the course of the argument Presiding Justice Manton suggested that a formal order of intervention be made, whereupon counsel for Petitioner filed an affidavit upon which a formal order, granting intervention, was entered on December 15, 1937. No limitations of any kind are contained in that order. Nor is there anything in the affidavit upon which the order was based suggesting any limitation, but counsel was careful to state

that the order should include not only what was to follow, but what had preceded, so as to enable him to file the brief on the motion for a stay of proceedings which had already been argued orally (Transcript of Record, pp. 1735, 1737). That the Circuit Court of Appeals did not intend to limit the right of counsel for Petitioner to the making of an argument and filing of a brief, but intended to accord Petitioner the full status of a party, is shown by the fact that in its final decision on the merits, rendered March 14, 1938, the court not only notes, in the preliminary statement, that United "intervened in support of the order," but also notes the appearance of

> "Louis B. Boudin of New York City for Intervener United Electrical and Radio Workers of America, C.I.O."

This is in striking contrast to what follows immediately, namely,—

> "James J. O'Brien, of Philadelphia, Pa., amicus curiae."
>
> 95 F. (2d) 392.

Clearly the court differentiated between one who merely files a brief and one who is a party to the litigation.

9. But this status of Petitioner as a party litigant had been recognized all along by the other parties to the litigation. We have already noted the formal steps of the Consolidated Edison companies prior to the entry of the formal order of intervention in the Circuit Court of Appeals. After the entry of that order, on January 7, 1938, counsel for the Consolidated Edison companies served their brief on the merits in the Circuit Court of Appeals. That brief is entitled in a manner to show Petitioner as a party, referring to it as "Intervening Respondent" in the title. And in the opening statement of the brief it is stated that—

> "The United Electrical and Radio Workers of America, affiliated with the Committee for Industrial

Organization, which filed a charge upon which the Board acted, has been admitted to the proceeding as an Intervenor."

10. Nor was the recognition of Petitioner as a party limited either to counsel for Consolidated Edison companies or to the proceedings in the Circuit Court of Appeals. On March 21, 1938, Consolidated Edison companies and I.B.E.W. each served on present counsel an order to show cause signed by Judge Manton on an application by the Consolidated Companies and I.B.E.W. for a stay of proceedings pending an appeal to the United States Supreme Court. These orders were captioned in a manner to show Petitioner as a party to the proceedings, and the body of the orders specifically directed that service of the order to show cause be made "on Louis B. Boudin, Esq., attorney for the intervenor."

11. On March 22, 1938, counsel for the Board served on counsel for Petitioner a copy of the Board's proposed decree on the decision of the Circuit Court of Appeals directing enforcement of its order.

12. Petitioner appeared in opposition to the motion for a stay pending appeal to the United States Supreme Court and filed an affidavit in opposition to that motion; and subsequently Consolidated companies served on present counsel for Petitioner reply affidavits in connection with that motion, captioned as already stated. On April 1, 1938, counsel for N.L.R.B. served on counsel for Petitioner a copy of the Board's affidavit in opposition to the motion for a stay. On April 6, 1938, the Clerk of the Circuit Court of Appeals notified counsel for Petitioner of the action of the court in granting the stay.

13. On April 14, 1938, Consolidated Edison companies and I.B.E.W. gave counsel for Petitioner formal notice of the fact that their respective petitions for certiorari had been filed with the United States Supreme Court, serving at the same time copies of their respective briefs in support of

the said petitions. Thereafter present counsel, appearing on behalf of Petitioner, filed a brief in opposition to the application for certiorari.

14. The Supreme Court of the United States, in granting certiorari to the Consolidated Edison companies and to the I.B.E.W. on May 16, 1938, recognized that the Petitioner herein was a party to the proceedings. The Court, through its Clerk, notified counsel for the Petitioner herein, as it did the Board and the other parties, that certiorari had been granted to the Consolidated Edison companies and to the I.B.E.W. And, significantly, the orders of the Court, granting certiorari, refer to the Petitioner herein as a party, for these orders (Nos. 916 and 957, October Term 1937) are respectively entitled "Consolidated Edison Company of New York, Inc., et al. v. National Labor Relations Board, et al." and "International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local Union No. B-825, v. National Labor Relations Board, et al." Since, aside from the Board, the Petitioner herein was the only respondent in that case, the words "et al." which follow the words "National Labor Relations Board", refer to the Petitioner herein and signify that it was a party. (Official file, Nos. 42,397 and 42,438.)

15. After the grant by the United States Supreme Court of Application for certiorari, the parties through their counsel, on August 5, 1938, signed a stipulation consenting to the filing of a brief *amicus curiae* by Lee Pressman, Esq., on behalf of Committee for Industrial Organization, and by D. William Leider, Esq., on behalf of Utility Workers Organizing Committee. These stipulations were signed by Louis B. Boudin, Esq., as counsel for United.

16. Subsequently counsel for the respective parties exchanged briefs on the main question before the Supreme Court, serving their briefs on present counsel as counsel for Petitioner. The briefs were captioned in a manner to show not only that Petitioner was an "intervenor", but also that it was a "respondent".

17. At the argument before the United States Supreme Court Petitioner appeared by its own counsel, who argued the cause orally, in addition to filing his brief. The notation of his appearance in the official report of the case in the Supreme Court is as follows:

> "Mr. Louis B. Boudin, of New York City, argued the cause and filed a brief for respondent (intervener) United Electrical and Radio Workers of America:"

18. After rendering its decision, the Supreme Court issued its mandate to the Circuit Court of Appeals, which is entitled "Consolidated Edison Co. of New York, Inc., and Its Affiliated Companies, et al., vs. National Labor Relations Board, et al." and "International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local Union No. B-825, et al., vs. National Labor Relations Board, et al."

Here, too, the words "et al." necessarily refer to the Petitioner herein, since aside from the National Labor Relations Board it was the only respondent in the enforcement proceedings.

---

## APPENDIX B.

### The Extent of Petitioner's Participation in the Litigation Which Terminated in the Decree Herein.

The foregoing recital of the formal steps in the litigation intended to show the *status* of Petitioner, also sufficiently indicate the extent of its participation,—which certainly did not differ in the slightest from that of the National Labor Relations Board, at least from the time that the matter came into the Circuit Court of Appeals. Its participation in the proceedings before the Board itself was only limited in one respect, in that the actual examination of witnesses was done by counsel for the National Labor Relations Board. That counsel for Petitioner were not mere spectators at the protracted hearings is evidenced by the fact that it appeared by

two counsel at each of the hearings. Nor was their function limited to mere consultation with counsel for the Board who were conducting the examination. On the contrary, the record shows that Mr. Louis B. Boudin at least participated in the most important arguments (see Transcript of Record, pp. 141, 150, 157). Indeed, it may be said without reflection on counsel for the Board, that he made the main arguments of the most important questions of law which arose in the course of the actual hearings,—which was apparently his function at these hearings.

The statement of counsel for Consolidated Edison in their brief that a trial examiner had ruled so as to exclude the participation of counsel for Petitioner in the hearings is clearly unwarranted. What actually happened at the point indicated in their brief was this:

Counsel for the Board had examined a witness, Foster Strader, called by the Board. After he was through with the re-direct, Mr. Cohn, one of the counsel for Petitioner, attempted to examine him further, whereupon the following colloquies occurred:

> "Mr. Ransom: I object to the question.
>
> Mr. Cohn: Wait until I finish the question.
>
> Mr. Ransom: I object to it. I object to any participation of anyone who is not a party to these proceedings, as far as I know there are only two counsel in this case who are entitled to be heard and one counsel on behalf of the government, who is the Regional Labor Board attorney, representing the complainant, the Regional Labor Board herein, and the other is counsel for these respondents appearing specially.
>
> Mr. Cohn: I submit that we are parties of interest here. Our appearances have been entered here and we are attorneys for the complainants who originally filed the charge and we would like to be heard.
>
> Judge Ransom: May I suggest that orderly procedure requires that this proceeding proceed in the usual way.
>
> Trial Examiner Gates: Normally examination will be conducted by one attorney, and I will sustain the objection."

Transcript of Record, pp. 338-339.

It will be observed that when counsel for Consolidated Edison raised an objection directed to the *standing* of Petitioner's counsel, his objection was immediately and conclusively disposed of by the answer of counsel for Petitioner. That counsel for Consolidated himself thought that he was wrong is evidenced by the fact that he did not press that objection but abandoned it, and substituted therefor a proper objection, namely, that normally at least one counsel is permitted to examine a witness unless the interests of the party who attempts to examine on his own behalf is different from that of the party whose counsel had already examined him, which was not the case here. *And it was that objection that the examiner sustained.* It is significant that no objection was raised by counsel for Consolidated when Mr. Boudin argued legal propositions, since counsel for various parties are normally allowed to argue legal questions even though they may be on the same side.

APPENDIX C.

No. 19

IN THE

# Supreme Court of the United States

OCTOBER TERM—1938

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*
*Petitioners*

*against*

NATIONAL LABOR RELATIONS BOARD
*Respondent*

*and*

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA affiliated with the COMMITTEE FOR INDUSTRIAL ORGANIZATION
*Intervenor-respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PETITIONERS

WILLIAM L. RANSOM
WESLEY A. STURGES
P. M. BERKSON
*Counsel for Petitioners*

WHITMAN, RANSOM, COULSON & GOETZ
*Solicitors for Petitioners*
No. 40 Wall Street
New York City

## APPENDIX D.

In The

# Supreme Court of the United States

October Term, 1938.

## No. 25.

International Brotherhood of Electrical Workers; International Brotherhood of Electrical Workers, Local Union No. B-825; International Brotherhood of Electrical Workers, Local Union No. B-839; International Brotherhood of Electrical Workers, Local Union No. B-832; International Brotherhood of Electrical Workers, Local Union No. B-826; International Brotherhood of Electrical Workers, Local Union No. B-828; International Brotherhood of Electrical Workers, Local Union No. B-829; and International Brotherhood of Electrical Workers, Local Union No. B-830, Affiliated with the American Federation of Labor, *Petitioners*,

*against*

National Labor Relations Board, *Respondent*,

and

United Electrical and Radio Workers of America, Affiliated with the Committee for Industrial Organization, *Intervenor-Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

## REPLY BRIEF FOR PETITIONERS, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND ITS ABOVE-NAMED LOCAL UNIONS, TO BRIEF OF RESPONDENT, THE NATIONAL LABOR RELATIONS BOARD.

ISAAC LOBE STRAUS,
Munsey Building,
Baltimore, Maryland.

CLAUDE A. HOPE,
DELAFIELD, MARSH, PORTER & HOPE,
20 Exchange Place,
New York, N. Y.

*Counsel for Petitioners.*